RECENT DECISIONS

ARMY AND NAVY—ERRONEOUS SENTENCE—DISCHARGE TERMINATES SERVICE.—The relator was given a bad-conduct discharge from the United States Navy pursuant to the sentence of a summary court-martial. Later the Secretary of the Navy disapproved this sentence, and the relator was ordered to report back to the Navy. He obeyed under protest. Thereafter, he returned home on leave and refused to return. He was arrested, declared a deserter and was about to be tried as such. On application for a writ of *habeas corpus,* it was *held* that the Navy Department had no jurisdiction over him. *Ex parte Harris* (D. C. 1920) 268 Fed. 911.

The decision in the principal case seems clearly correct. The relator was discharged, under authority of (1909) 35 Stat. 623, U. S. Comp. Stat. (1916) § 3022, by officers acting pursuant to the sentence of a summary court of competent jurisdiction. The effect was to change his status from that of a sailor to that of a civilian. The jurisdiction of the Navy Department could be restored only by re-enlistment. A similar result has been reached in the Army without the aid of the federal courts. (1912) Dig. Op. J. A. G. Army 456. The Attorney General was also of this opinion. *Case of Lieut. Helms* (1869) 12 Op. Att. Gen. 16. The effect of the rule is, apparently, that where an enlisted man has been dishonorably discharged, as in the instant case, there is no possibility of removing the stain upon his reputation except by Act of Congress or by re-enlistment with subsequent honorable discharge. See (1912) Dig. Op. J. A. G. Army 456.

BAILMENTS—LIABILITY OF BAILEE FOR HIRE AND GRATUITOUS BAILEE COMPARED—NEGLIGENCE.—The plaintiff sent a number of pelts to the defendant, a habitmaker, to be made into a coat. Upon its completion, the plaintiff was notified and instructions regarding its disposal requested. The plaintiff replied that she would call for it. The coat was placed each day in an unlocked show-case in the defendant's show-room. Subsequently, two unknown women entered the defendant's store, induced the only clerk there to leave the room by a common pretext, and stole the coat. They were convicted of larceny, but the coat was never found. *Held,* since the defendant was a bailee for reward, and was negligent, the plaintiff might recover the value of the pelts. But a stay of execution was granted on the theory that if, on appeal, the defendant should be declared a gratuitous bailee, he would not be liable. *Mitchell* v. *Davis* (K. B. 1920) 37 T. L. R. 68.

A gratuitous bailee is liable only for gross negligence. *Giblin* v. *McMullen* (1869) L. R. 2 P. C. 317; *Scott* v. *Nat. Bank of Chester Valley* (Pa. Sup. Ct. 1874) 10 Can. L. J., N. S., 182; see *First Nat. Bank* v. *Ocean Nat. Bank* (1875) 60 N. Y. 278, 295; (1916) 16 COLUMBIA LAW REV. 66. The usual definition of "gross negligence," in this class of cases, is want of that care which a reasonably prudent man would use in keeping his own property of like nature. *Bullen* v. *Swan Elec. Engraving Co.* (K. B. 1906) 22 T. L. R. 275; *Wiehe* v. *Dennis Bros.* (K. B. 1913) 29 T. L. R. 250; *Giblin* v. *McMullen, supra.* In a bailment for mutual benefit, *locatio operis faciendi,* the bailee must exercise ordinary and reasonable care. *Perera* v. *Panama, etc. Co.* (1918) 179 Cal. 63, 175 Pac. 454; *Grant* v. *Miller* (1916) 159 N. Y. Supp. 829. This degree of care is also defined as that which a man takes of his own goods. *Finucane* v. *Small* (1795) 1 Esp. 315. In either case, the bailee is excused if he can show absence of negligence on his part. *Powell* v. *Graves & Co.* (Q. B. 1886) 2 T. L. R. 663; (1913) 13 COLUMBIA LAW

REV. 542; *Meyer* v. *Metropolis Knitting Mills, Inc.* (1915) 154 N. Y. Supp. 209. It is not material whether the degree of care be described as slight or ordinary, for there is negligence if there is want of such care as the circumstances require. *Bean* v. *Ford* (1909) 65 Misc. 481, 119 N. Y. Supp. 1074. This is a question of fact, and the value, quality and portability of the chattel bailed should be considered. Since the definitions laid down by the courts appear to indicate that, in the abstract, the standard of care required by a gratuitous bailee is the same as that of a bailee for reward, the assumption of the judge, in the instant case, that there is some inherent difference in the liability of these two classes of bailees seems incorrect. If all the circumstances justified a finding of negligence, the question of whether the bailment for reward had terminated, should have been regarded as immaterial.

BANKS AND BANKING—SALE OF FOREIGN EXCHANGE—DEPOSIT OF PAYMENT.—The plaintiff gave an order to A & Co., bankers, to cable 18,000 lire to Naples. A & Co. sent him a memorandum that he had "bought of A & Co. . . . cable transfer to Italy . . . lire 18,000 @ 5.19⅞ . . . Payments required in cash or certified checks; otherwise, order, if accepted, will be executed after collection of checks." The plaintiff gave A & Co. his certified check, which was deposited in the defendant bank. A & Co. failed the next day without having cabled the transfer. The bank had not put the check through the clearing-house before the failure. *Held,* the plaintiff would have to come in as a general creditor with respect to the proceeds of the check in the hands of the defendant. *Legniti* v. *Mechanics & Metals National Bank* (N. Y. Ct. of App. March 1, 1921) not yet reported.

The Appellate Division of the Supreme Court had decided that a constructive trust arose in favor of the plaintiff. (1919) 186 App. Div. 105, 173 N. Y. Supp. 814. This result was criticised in (1919) 19 COLUMBIA LAW REV. 322, in which it was pointed out that the needs of the business community demanded that the court construe the relationship as that of debtor and creditor, not of fiduciary. The Court of Appeals has now taken this point of view.

DEEDS—DELIVERY—ESCROWS.—The plaintiff executed a deed of certain real property, complete and unconditional on its face, and gave manual possession thereof to the grantee. At the same time the parties orally agreed that the grantee should return the deed to the grantor when the latter married her and that it should become effective only in case of his failure to do so. The marriage agreement was accordingly performed; but before that event a third party wrongfully caused the deed to be recorded. The wife died, leaving the defendants as her heirs. The plaintiff claimed that this deed was a cloud on his title and asked its removal. *Held,* it was a cloud because there was no delivery of the deed, for "A deed takes effect from delivery and to constitute a valid delivery, it must clearly appear that it was the intention that the deed should pass title at the time." *Mitchell* v. *Clem* (Ill. 1920) 128 N. E. 815.

If the court's test of delivery were a true one, such a thing as delivery in escrow to a stranger would be an impossibility. It is not essential to the validity of a deed delivered in escrow that there be a redelivery after the happening of the condition. *Conneau* v. *Geis* (1887) 73 Cal. 176, 14 Pac. 580; see *White Star Line etc.* v. *Moragne* (1890) 91 Ala. 610, 611, 8 So. 867. That being so, since "delivery" is essential to the validity of a sealed instrument, 1 Williston, *Contracts* (1920) 420, delivery to a stranger in escrow must be a delivery although the parties do not intend to pass title at the time. It is necessary only that the grantor have the present intention to extinguish his rights, privileges, *etc.* in the land and to create similar legal attributes in the grantee either at once or upon the occur-